U.S. Department of Labor

Office of Administrative Law Judges
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DATE ISSUED: 10/04/2000

CASE NO.: 1999-BLA-484

In the Matter of

RUFFICE C. ESTEP,
Claimant

v.

PREMIUM ENERGY, INC.,
Employer

and

WV CWP FUND,
Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest

Appearances:

Bobby S. Belcher, Jr., Esq.,
For the Claimant

Robert Weinberger, Esq.,
For the Employer

Before: RICHARD A. MORGAN
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a duplicate claim for benefits, under the Black Lung Benefits

Act, 30 U.S.C. § 901 *et seq.* ("Act"), filed on March 13, 1998. (DX 1).[1] The Act and implementing regulations, 20 C.F.R. parts 410, 718, and 727 (Regulations), provide compensation and other benefits to:

1. Living coal miners who are totally disabled due to pneumoconiosis and their dependents;
2. Surviving dependents of coal miners whose death was due to pneumoconiosis; and,
3. Surviving dependents of coal miners who were totally disabled due to pneumoconiosis at the time of their death.

The Act and Regulations define pneumoconiosis ("black lung disease" or "coal workers pneumoconiosis" "CWP") as a chronic dust disease of the lungs and its sequelae, including respiratory and pulmonary impairments arising out of coal mine employment.

PROCEDURAL HISTORY

The claimant filed his first prior claim for benefits on March 6, 1996. (DX 26-1). The claim was denied because the evidence failed to establish that claimant had pneumoconiosis arising out of coal mine employment and was totally disabled due to pneumoconiosis. (DX 26-14). By letter dated April 25, 1996, claimant requested his claim remain open and submitted additional evidence. (DX 26-24). On May 1, 1996, the claims examiner informed claimant that the previous decision remained unchanged, and that the case was administratively closed. (DX 26-25).[2]

The claimant filed his most recent claim for benefits on March 13, 1998. (DX 1). On November 4, 1998, the District Director made and initial determination that claimant was eligible for benefits. (DX 24). By letter dated December 18, 1998, the District Director informed the claimant that the employer declined to assume responsibility for payment of benefits and that the Black Lung Disability Trust Fund will begin to make interim payments. (DX 25). On January 22, 1999, the case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs (OWCP) for a formal hearing. (DX 28). I was assigned the case on April 12, 2000.

On August 17, 2000, I held a hearing in Abingdon , Virginia, at which the claimant, employer, and insurer were represented by counsel.[3] No appearance was entered for the Director, Office of Workman Compensation Programs (OWCP). The parties were afforded the full opportunity to present evidence and argument. Claimant's exhibits ("CX") 1-8, Director's

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[1] The following abbreviations are used for reference within this opinion: DX-Director's Exhibits; CX- Claimant's Exhibit; EX- Employer's Exhibit; TR- Hearing Transcript; Dep.- Deposition.

[2] The Director erred in not treating claimant's letter as a request for modification. Therefore, I will treat the present claim as a modification and consider all of the evidence of record.

[3] Under *Kopp v. Director, OWCP*, 877 F.2d 307, 309 (4th Cir. 1989), the area the miner was exposed to coal dust is determinative of the circuit court's jurisdiction.

exhibits ("DX") 1-28, and Employer's exhibits ("EX") 1-8 were admitted into the record.

ISSUES

I. Whether the miner has pneumoconiosis as defined by the Act and the Regulations?

II. Whether the Miner's pneumoconiosis arose out of his coal mine employment?

III. Whether the miner is totally disabled?

IV. Whether the miner's disability is due to pneumoconiosis?

V. Whether there has been a material change in the claimant's condition?

FINDINGS OF FACT

I. Background

A. Coal Miner

I find and the parties agreed that the claimant was a coal miner, within the meaning of § 402(d) of the Act and § 725.202 of the Regulations, for at least thirty years. (TR 6).

B. Date of Filing

The claimant filed his claim for benefits, under the Act, on March 13, 1998. (DX 1). None of the Act's filing time limitations are applicable; thus, the claim was timely filed. (TR 6).

C. Responsible Operator

I find and the WV CWP Fund agreed that Premium Energy, Inc., is the last employer for whom the claimant worked a cumulative period of at least one year and is the properly designated responsible coal mine operator in this case, under Subpart F, Part 25 of the Regulations. (TR 6).

D. Dependents[4]

The claimant has one dependent for purposes of augmentation of benefits under the Act, his wife Charlene. (TR 6).

E. Personal, Employment and Smoking History

The claimant was born on March 3, 1938. (TR 12). He married Charlene, on September

[4] See 20 C.F.R. §§ 725.204-725.211.

17, 1959. (DX 7). He worked in the coal mines for at least thirty years. (TR 6, 12). Claimant worked twenty years with Premium Energy. (TR 13). Claimant worked as an electrician, mechanic, repairman, heavy equipment operator and welder. (TR 13). Claimant would lift up to one-hundred pounds and would be on his feet all day and would have to climb on large equipment. (TR 14). Claimant's primary job was as a mechanic and welder. (TR 15). Claimant has experienced shortness of breath since 1995. He suffers from back and knee problems. (TR 16). Claimant can only walk eight to ten feet before experiences shortness of breath. (TR 17). Claimant is only able to lift and carry up to five pounds due to his back and he also has difficulty breathing. (TR 17-18). Claimant uses an inhaler several times a day. (TR 19).

There is evidence of record that the claimant's respiratory disability is due, in part, to his history of cigarette smoking. Claimant testified that he quit smoking over ten years ago. Claimant testified that he smoked one-half a pack of cigarettes per day. (TR 20). On cross-examination, claimant agreed that he smoked for 43 years before quitting and smoked one-half to one pack of cigarettes per day. (TR 21). Claimant testified that he currently weighs 320 pounds. (TR 21).

II. Medical Evidence

A. Chest X-rays

There were sixteen readings of five x-rays, taken between June 5, 1995 and December 22, 1999.

Exh. #	**Dates: 1. x-ray 2. read**	**Reading Physician**	**Qualific-ations**	**Film Qual-ity**	**ILO Classif-ication**	**Interpretation or Impression**
DX 26-24	06-05-95 06-12-95	Barker				Markedly depressed excursion of the right hemidiaphragm.
DX 26-11	03-25-96 03-25-96	Forehand	B	1		No parenchymal or pleural abnormalities consistent with pneumoconiosis; elevated hemidiaphragm.
DX 26-12	03-25-96 04-05-96	Francke	B; BCR	1		Film completely negative.
DX 14	04-10-98 04-10-98	Ranavaya	B	1	1/0	p/q in six zones.
DX 15	04-10-98 06-04-98	Sargent	B; BCR	1		No parenchymal or pleural abnormalities consistent with pneumoconiosis; elevated right diaphragm.

Exh. #	Dates: 1. x-ray 2. read	Reading Physician	Qualific-ations	Film Qual-ity	ILO Classif-ication	Interpretation or Impression
DX 16	04-10-98 06-20-98	Cole	B; BCR	1		No parenchymal or pleural abnormalities consistent with pneumoconiosis; elevation of right hemi-diaphragm.
EX 6	04-10-98 03-02-99	Wiot	B; BCR	2		No evidence of CWP; elevation of the right hemidiaphragm, left hilum is dense, but is not related to coal dust exposure.
DX 7	04-10-98 03-22-99	Perme	B; BCR	2		No evidence of CWP; eventration of the right hemidiaphragm.
EX 1	04-10-98 01-14-00	Meyer	B; BCR	1		No radiographic evidence of CWP; increased density in the left hilum and mediastinum, possibility of adenopathy or mass.
EX 2	04-10-98 02-08-00	Shipley	B; BCR	1		No parenchymal or pleural abnormalities consistent with pneumoconiosis; elevated right hemi-diaphragm.
EX 3	04-10-98 03-03-00	Wiot	B; BCR	2		No evidence of CWP; marked elevation of the right hemidiaphragm.
EX 4	04-10-98 03-24-00	Meyer	B; BCR	1		No radiographic evidence of CWP; asymmetric density in the left hilum, may be secondary to of adenopathy or mass.
EX 5	04-10-98 03-31-00	Spitz	B; BCR	1		No evidence of CWP; elevation of the right hemidiaphragm.
CX 4	07-20-99 07-20-99	Mullens	BCR			Slight elevation of the right hemidiaphragm, lungs are clear.
CX 4	07-20-99 07-20-99	Robinette	B	1	1/0	q/t in 3 lower zones/
CX 6	12-22-99 12-22-99	Coburn	B, BCR[5]			Slight elevation of the right hemidiaphragm, no active disease.

* A- A-reader; B- B-reader; BCR- Board-certified radiologist; BCP-Board-certified pulmonologist; BCI= Board-certified internal medicine. Readers who are Board-certified radiologists and/ or B-readers are classified as the most qualified. *See Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 145 n. 16, 108 S.Ct. 427, 433 N.16, 98 L.Ed. 2d 450 (1987) and, *Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 1276 n.2 (7th Cir. 1993). B-readers need not be radiologists.

[5] I take judicial notice of Dr. Coburn's credential from the American Board of Medical Specialties and NIOSH B-Reader List.

** The existence of pneumoconiosis may be established by chest x-rays classified as category 1, 2, 3, A, B, or C according to ILO-U/C International Classification of Radiographs. A chest x-ray classified as category "0," including subcategories 0/-, 0/0, 0/1, does not constitute evidence of pneumoconiosis. 20 C.F.R. § 718.102(b). In some instances, it is proper for the judge to infer a negative interpretation where the reading does not mention the presence of pneumoconiosis. *Yeager v. Bethlehem Mines Corp.*, 6 B.L.R. 1-307 (1983)(Under Part 727 of the Regulations) and *Billings v. Harlan #4 Coal Co.*, BRB No. 94-3721 (June 19, 1997))*(en banc*)(*Unpublished*). If no categories are chosen, in box 2B(c) of the x-ray form, then the x-ray report is not classified according to the standards adopted by the regulations and cannot, therefore, support a finding of pneumoconiosis.

B. Pulmonary Function Studies

Pulmonary Function Tests are tests performed to measure the degree of impairment of pulmonary function. They range from simple tests of ventilation to very sophisticated examinations requiring complicated equipment. The most frequently performed tests measure forced vital capacity (FVC), forced expiratory volume in one-second (FEV_1) and maximum voluntary ventilation (MVV).

Physician Date Exh.#	**Age Height**	**FEV_1**	**MVV**	**FVC**	**Tra-cings**	**Compre-hension Cooper-ation**	**Qualify**	**Dr.'s Impression**
Ranavaya 12-08-95 DX 26-24	58 74"	3.63 4.05 +	103 115+	4.65 5.02	Yes		No No+	
Forehand 03-25-96 DX 26-8	58 73"	3.63	108	4.72	Yes		No	
Ranavaya 04-10-98 DX 8	60 73"	3.45 3.69 +	115 108+	4.50 4.62+	Yes	Good Good	No No+	
Robinette 07-20-99 CX 4	61 72"	3.45		4.45	Yes		No	
Robinette 01-11-00 CX 6	61 72"	3.49		4.51	Yes		No	"Normal spirometry and normal lung volumes with a normal diffusion capacity"

* A "**qualifying"** pulmonary study or arterial blood gas study yields values which are equal to or less than the applicable table values set forth in Appendices B and C of Part 718.
** A study "**conforms**" if it complies with applicable quality standards (found in 20 C.F.R. § 718.103(b) and (c)). (*see Old Ben Coal Co. v. Battram*, 7 F.3d. 1273, 1276 (7th Cir. 1993)). A judge may infer, in the absence of evidence to the contrary, that the results reported represent the best of three trials. *Braden v. Director, OWCP*, 6 B.L.R. 1-1083 (1984). A study which is not accompanied by three tracings may be discredited. *Estes v. Director, OWCP*, 7 B.L.R. 1-414 (1984).
+Post-bronchodilator.

For a miner of the claimant's height of 73 inches, § 718.204(c)(1) requires an FEV_1 equal to or less than 2.31 for a male 60 years of age.[6] If such an FEV_1 is shown, there must be in addition, an FVC equal to or less than 2.95 or an MVV equal to or less than 92; or a ratio equal to or less than 55% when the results of the FEV1 test are divided by the results of the FVC test. Qualifying values for other ages and heights are as depicted in the table below. The FEV_1/FVC ratio requirement remains constant.

Height	Age	FEV_1	FVC	MVV
74"	58	2.40	3.05	96
73"	58	2.34	2.97	94
73"	60	2.31	2.95	92
72"	61	2.20	2.80	88

C. Arterial Blood Gas Studies[7]

Blood gas studies are performed to detect an impairment in the process of alveolar gas exchange. This defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. A lower level of oxygen (O2) compared to carbon dioxide (CO2) in the blood indicates a deficiency in the transfer of gases through the alveoli which will leave the miner disabled.

Date Ex.#	Physician	pCO_2	pO_2	Qualify	Physician Impression
12-08-95 DX 26-24	Ranavaya	40.7	77.2	No	
03-25-96 DX 26-10	Forehand	36 36+	65 76+	No No+	
04-10-98 DX 12	Ranavaya	37.3	56.0	Yes	(Dr. Michos opined that test is technically acceptable, DX 12).

[6] The fact-finder must resolve conflicting heights of the miner on the ventilatory study reports in the claim. *Protopappas v. Director, OWCP*, 6 B.L.R. 1-221 (1983). This is particularly true when the discrepancies may affect whether or not the tests are "qualifying." *Toler v. Eastern Associated Coal Co.*, 43 F.3d 3 (4th Cir. 1995). I find the miner is 73" here, his average reported height.

[7] 20 C.F.R. § 718.105 sets the quality standards for blood gas studies.
20 C.F.R. § 718.204(c) permits the use of such studies to establish "total disability." It provides:
In the absence of contrary probative evidence, evidence which meets the standards of either paragraphs (c)(1), (2), (3), (4), or (5) of this section shall establish a miner's total disability: . . .
(2) Arterial blood gas tests show the values listed in Appendix C to this part . . .

Date Ex.#	Physician	pCO_2	pO_2	Qualify	Physician Impression
07-20-99 CX 4	Robinette	38.3	80	No	
01-11-00 CX 6	Robinette	35.8	71	No	Normal

+ Results, if any, after exercise. Exercise studies are not required if medically contraindicated. 20 C.F.R. § 718.105(b).

D. Physicians' Reports

A determination of the existence of pneumoconiosis may be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers or suffered from pneumoconiosis. 20 C.F.R. § 718.202(a)(4). Where total disability cannot be established, under 20 C.F.R § 718.204(c)(1), (2), or (3), or where pulmonary function tests and/or blood gas studies are medically contraindicated, total disability may be nevertheless found, if a physician, exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in employment, i.e., performing his usual coal mine work or comparable and gainful work. § 718.204(b).

Dr. Forehand examined claimant for his original claim on March 25, 1996. (DX 26-9). Dr. Forehand noted claimant worked in coal mine employment for thirty-eight years as an electrician, welder and mechanic. Dr. Forehand reported claimant smoked one pack of cigarettes per day from 1956 until 1976. Claimant complained of wheezing, dyspnea, cough, orthopnea and ankle edema. Based on an x-ray, pulmonary function study and arterial blood gas study, Dr. Forehand found no evidence of active cardiopulmonary disease and found no respiratory impairment.

Dr. Ranavaya examined claimant on April 10, 1998. (DX 9). Claimant worked a total of thirty-four years in the coal mining industry, with fifteen years underground. Dr. Ranavaya reported that claimant smoked one pack of cigarettes per day from age seven until he quit in 1988. Claimant experienced a daily productive cough, dyspnea on exertion, orthopnea, ankle edema and paroxysmal nocturnal dyspnea. Based on an x-ray and thirty-four years of coal mine employment, Dr. Ranavaya diagnosed CWP. Dr. Ranavaya opined the claimant suffered a moderate impairment with moderate hypoxemia.

Dr. Ranavaya submitted a report dated July 27, 1998 based on a review of the April 10, 1998 x-ray and Dr. Sargent's and Dr. Cole's interpretations. (DX 11). Dr. Ranavaya noted claimant worked in coal mine employment for thirty-four years. Based on a review of the record, and a pulmonary function study dated April 10, 1998, Dr. Ranavaya opined that claimant has radiological evidence of CWP which arose from occupational dust exposure.

Dr. Clary, Board-certified in osteopathic medicine and surgery, submitted a letter dated October 4, 1999. (CX 1). Dr. Clary stated that claimant has been his patient since December of 1994 and claimant has had intermittent lung problems and shortness of breath. Dr. Clary stated that claimant has had x-rays in the past which showed parenchymal abnormalities consistent with pneumoconiosis. Dr. Clary opined that claimant may need medications in the future for his lungs.

Dr. Robinette, Board-certified in internal medicine with a subspecialty in pulmonary diseases, submitted a report dated August 17, 1999. (CX 4). Claimant complained of progressive dyspnea on exertion and has two pillow orthopnea. Dr. Robinette reported claimant was involved in a vehicle accident at his job site, resulting in a deep venous thrombophlebitis. Dr. Robinette noted claimant last worked in 1995 because of his back problems and increasing respiratory symptoms. Claimant last worked as an electrician and equipment operator. Dr. Robinette reported claimant was exposed to asbestos. Dr. Robinette noted claimant has weighed more than 300 pounds for most of his adult life.

Dr. Robinette noted a chest x-ray revealed focal eventration of the right diaphragm with a few calcified granuloma. Dr. Robinette opined that the pulmonary functions studies were normal with evidence of mild impairment of diffusion capacity. Dr. Robinette noted claimant's twenty years of coal mine employment. He reported claimant had diminished breath sounds in both lung fields. Dr. Robinette diagnosed "probable simple coal workers' pneumoconiosis" with a profusion abnormality of "1/0" and q/p opacities.

Dr. Robinette submitted a report dated February 2, 2000. (CX 6). Claimant complained of progressive dyspnea on exertion. Upon physical examination, Dr. Robinette reported claimant was obese and had diminished breath sounds without wheezes or rales. A spinal CT demonstrated slight elevation of the right hemidiapharagm and increased interstitial markings. Dr. Robinette opined that claimant had radiographic evidence of simple CWP confirmed by interstitial markings on the CT. Dr. Robinette opined the condition is chronic and due to occupational history.

III. Miscellaneous

Dr. Coburn interpreted a CT dated December 22, 1999. (CX 6). Dr. Coburn noted minimal increase in interstitial markings which may be due to occupational exposure; no evidence of pulmonary embolus; and, slight elevation of the right hemidiaphragm.

Claimant submitted a report, dated November 4, 1999, from Lisa Jenkins, a vocational consultant. (CX 3). Ms. Jenkins reported claimant worked in the coal mines since 1958. Claimant was required to lift in excess of 100 pounds, frequently bend and stoop, and walk. Ms. Jenkins categorized claimant's job as requiring medium to heavy exertional levels. Ms. Jenkins concluded that claimant has residual problems from a work related accident and occupational disease. She concluded that claimant is unable to return to his past work or other substantial employment due to the combined effects of his compensable injury and occupational disease.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Entitlement to Benefits

This claim must be adjudicated under the regulations at 20 C.F.R. Part 718 because it was filed after March 31, 1980. Under this Part, the claimant must establish, by a preponderance of the evidence, that he has pneumoconiosis, that his pneumoconiosis arose from coal mine employment, and that he is totally disabled due to pneumoconiosis. Failure to establish any one of these elements precludes entitlement to benefits. *20 C.F.R. §§ 718.202-718.205; Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 B.L.R. 1-26 (1987); and, *Perry v. Director, OWCP*, 9 B.L.R. 1-1 (1986). *See Lane v. Union Carbide Corp*., 105 F.3d 166, 170 (4th Cir. 1997).

I am considering all of the evidence of record and treating claimant's most recent claimant as a modification request. After claimant's original claim was denied, claimant submitted a letter requesting his claim remain open. Instead of treating claimant's letter as a request for modification, the claims examiner informed claimant that the previous decision remained unchanged and the case was administratively closed. Because claimant's letter constituted a request for modification filed within one year of the prior denial, I am considering all of the evidence of record.

Under 20 C.F.R. § 725.310, a modification petition may be based upon a mistake of fact or a change in conditions. In determining whether a mistake of fact has occurred, the Administrative Law Judge is not limited to a consideration of newly submitted evidence. All evidence of record may be reviewed to determine whether a mistake of fact was previously made. *O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256, 92 S.Ct. 405, 407, 30 L.Ed.2d 424 (1971)(per curiam)(decided under Longshore and Harbor Workers' Compensation Act). The Administrative Law Judge has "broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence previously submitted."[8] *O'Keefe*, 404 U.S. 254 at 257; *Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358, 1364 (4th Cir. 1996)(*en banc*), *quoting Jessee v. Director, OWCP*, 5 F.3d 723, 724 (4th Cir. 1993). Therefore, a complete review of the record will be conducted to determine whether a mistake of fact exists. Based on a review of the record, the claimant has failed to establish that there has been a mistake of fact.

To assess whether a change in conditions is established, the Administrative Law Judge must consider all of the new evidence, favorable and unfavorable, and consider it in conjunction with the previously submitted evidence to determine if the weight of the evidence is sufficient to demonstrate an element or elements of entitlement which were previously adjudicated against the

[8] The United States Court of Appeals for the Fourth Circuit reiterated its well-established modification standard in *Consolidation Coal Co. v. Borda*, ___ F.3d ___, 21 B.L.R. _____, No. 98-1109 (4th Cir. March 15, 1999), holding that "a request for modification need not meet formal criteria," and "there is no need for a smoking-gun factual error, changed conditions, or startling new evidence." Id. at 4.

claimant. *Kingery v. Hunt Branch Coal Co.*, 19 B.L.R. 1-6 (1994)("Change in conditions" not established where the existence of pneumoconiosis by chest x-ray was demonstrated in the original claim and the claimant merely submitted additional positive x-ray readings on modification); *Napier v. Director, OWCP*, 17 B.L.R. 1-111 (1993); *Nataloni v. Director, OWCP*, 17 B.L.R. 1-82 (1993); *and, Kovac v. BCNR Mining Corp.*, 14 B.L.R. 1-156 (1990), *aff'd on recon.*, 16 B.L.R. 1-71 (1992).

The claimant's first application for benefits was denied because the evidence failed to show that: (1) the claimant had pneumoconiosis; (2) the pneumoconiosis arose, at least in part, out of coal mine employment; and (3) the claimant was totally disabled by pneumoconiosis. (DX 26-14). Analyzing the newly submitted evidence of record, in conjunction with the previously submitted evidence, I find that claimant has not established a change in conditions.

B. Existence of Pneumoconiosis

Pneumoconiosis is defined as a "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment."[9] 30 U.S.C. § 902(b) and 20 C.F.R. § 718.201. The definition is not confined to "coal workers' pneumoconiosis," but also includes other diseases arising out of coal mine employment, such as anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, progressive massive fibrosis, silicosis, or silicotuberculosis. 20 C.F.R. § 718.201. The term "arising out of coal mine employment" is defined as including "any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment."

" . . . [T]his broad definition 'effectively allows for the compensation of miners suffering from a variety of respiratory problems that may bear a relationship to their employment in the coal mines.'" *Robinson v. Pickands Mather & Co./Leslie Coal Co. & Director, OWCP*, 14 B.L.R. 2-68 (4th Cir. 1990) at 2-78, 914 F.2d 35 (4th Cir. 1990) *citing*, *Rose v. Clinchfield Coal Co.*, 614 F. 2d 936, 938 (4th Cir. 1980).

Thus, asthma, asthmatic bronchitis, or emphysema may fall under the regulatory definition of pneumoconiosis if they are related to coal dust exposure. *Robinson v. Director, OWCP*, 3 B.L.R. 1-798.7 (1981); *Tokarcik v. Consolidation Coal Co.*, 6 B.L.R. 1-666 (1983). Likewise, chronic obstructive pulmonary disease may be encompassed within the legal definition of pneumoconiosis. *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173 (4th Cir. 1995).

The Board has recently adopted the Director's position to hold that "a transient aggravation of a non-occupational pulmonary condition is insufficient to establish pneumoconiosis as defined at Section 718.201." *Henley v. Cowan and Co.*, 21 B.L.R. 1-148,

[9] Pneumoconiosis is a progressive and irreversible disease; once present, it does not go away. *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *Lisa Lee Mines v. Director*, 86 F.3d 1358 (4th Cir. 1996)(*en banc*) at 1364; *LaBelle Processing Co. v. Swarrow*, 72 F.3d 308 (3d Cir. 1995) at 314-315.

BRB No. 98-1114 BLA (May 11, 1999).[10]

The claimant has the burden of proving the existence of pneumoconiosis. The Regulations provide the means of establishing the existence of pneumoconiosis by: (1) a chest x-ray meeting the criteria set forth in 20 C.F.R. § 718.202(a); (2) a biopsy or autopsy conducted and reported in compliance with 20 C.F.R. § 718.106; (3) application of the irrebuttable presumption for "complicated pneumoconiosis" found in 20 C.F.R. § 718.304; or (4) a determination of the existence of pneumoconiosis made by a physician exercising sound judgment, based upon certain clinical data and medical and work histories, and supported by a reasoned medical opinion. 20 C.F.R. § 718.202(a).

In *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 2000 WL 524798 (4th Cir. 2000), the Fourth Circuit held that the administrative law judge must weigh all evidence together under 20 C.F.R. § 718.202(a) to determine whether the miner suffered from coal workers' pneumoconiosis.

As a general rule, more weight is given to the most recent evidence because pneumoconiosis is a progressive and irreversible disease. *Stanford v. Director, OWCP*, 7 B.L.R. 1-541 (1984); *Tokarcik v. Consolidated Coal Co.*, 6 B.L.R. 1-166 (1983); and, *Call v. Director, OWCP*, 2 B.L.R. 1-146 (1979). This rule is not to be mechanically applied to require that later evidence be accepted over earlier evidence. *Burns v. Director, OWCP*, 7 B.L.R. 1-597 (1984).

It is rational to credit more recent evidence, solely on the basis of recency, only if it shows the miner's condition has progressed or worsened. *Adkins v. Director, OWCP*, 958 F.2d 49, 16 B.L.R. 2-61 (4th Cir. 1992). The court reasoned that, because it is impossible to reconcile conflicting evidence based on its chronological order if the evidence shows that a miner's condition has improved, inasmuch as pneumoconiosis is a progressive disease and claimants cannot get better, "[e]ither the earlier or the later result must be wrong, and it is just as likely that the later evidence is faulty as the as the earlier. . ." *See also, Thorn v. Itmann Coal Co.*, 3 F.3d 713, 18 B.L.R. 2-16 (4th Cir. 1993).

The claimant cannot establish pneumoconiosis pursuant to subsection 718.202(a)(2) because there is no biopsy evidence in the record. The claimant cannot establish pneumoconiosis under § 718.202(a)(3), as none of that sections presumptions are applicable to a living miner's claim filed after Jan. 1, 1982, with no evidence of complicated pneumoconiosis.

A finding of the existence of pneumoconiosis may be made with positive chest x-ray evidence.[11] 20 C.F.R. § 718.202(a)(1). "[W]here two or more x-ray reports are in conflict, in

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[10] As a result, the Board concluded that the ALJ erred in finding legal pneumoconiosis based upon medical opinions which diagnosed a temporary worsening of pulmonary symptoms due to exposure to coal dust, but no permanent effect. Id.

[11] "There are twelve levels of profusion classification for the radiographic interpretation of simple pneumoconiosis. . . *See* N. LeRoy Lapp, '*A Lawyer's Medical Guide to Black Lung Litigation,*' 83 W. VA. LAW REVIEW 721, 729-731 (1981)." Cited in *Lisa Lee Mines v. Director*, 86 F.3d 1358 (4th Cir. 1996)(*en banc*) at 1359, n. 1.

evaluating such x-ray reports, consideration shall be given to the radiological qualifications of the physicians interpreting such x-rays." *Id.; Dixon v. North Camp Coal Co.*, 8 B.L.R. 1-344 (1985)."(Emphasis added). (Fact one is Board-certified in internal medicine or highly published is not so equated). *Melnick v. Consolidation Coal Co. & Director, OWCP*, 16 B.L.R. 1-31 (1991) at 1-37. Readers who are board-certified radiologists and/or B-readers are classified as the most qualified. The qualifications of a certified radiologist are at least comparable to if not superior to a physician certified as a B-reader. *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211, 1-213 n. 5 (1985).

A judge is not required to defer to the numerical superiority of x-ray evidence, although it is within his or her discretion to do so. *Wilt v. Woverine Mining Co.*, 14 B.L.R. 1-70 (1990) citing *Edmiston v. F & R Coal*, 14 B.L.R. 1-65 (1990). This is particularly so where the majority of negative readings are by the most qualified physicians. *Dixon v. North Camp Coal Co.*, 8 B.L.R. 1-344 (1985); *Melnick v. Consolidation Coal Co. & Director, OWCP*, 16 B.L.R. 1-31, 1-37 (1991).

There were three x-ray interpretations submitted in connection with his original claim all of the interpretations were negative for pneumoconiosis. The record contains ten interpretations of the April 10, 1998 x-ray. Nine physicians qualified as B-readers and Board-certified radiologists found no radiographic evidence of CWP. Dr. Ranavaya, a B-reader, diagnosed pneumoconiosis, "1/0." Based on the majority of negative interpretations by the most qualified physicians, I find the April 10, 1998 x-ray negative for pneumoconiosis.

Dr. Mullens, a Board-certified radiologist, found claimant's lungs clear in the July 20, 1999 x-ray. Dr. Robinette, a B-reader, diagnosed pneumoconiosis "1/0." Because I find Dr. Mullens and Dr. Robinette equally qualified, I find the interpretations of the July 20, 1999 x-ray in equipose. Finally, claimant submitted Dr. Coburn's interpretation of the December 22, 1999 x-ray. Dr. Coburn, qualified as a B-reader and Board-certified radiologist, found no active disease, and no significant interstitial changes. Based on Dr. Coburn's interpretation, I find the December 22, 1999 x-ray negative for pneumoconiosis.

Dr. Coburn also interpreted a CT scan dated December 22, 1999.[12] Dr. Coburn noted a "minimal increase in the interstitial markings which may be due to occupational exposure." I find Dr. Coburn's interpretation equivocal in that he states the markings "may be" due to occupational exposure. Therefore, I do not afford his CT interpretation much weight.

Based on a review of all of the x-ray evidence of record, I find claimant has failed to establish the existence of pneumoconiosis by x-ray evidence.

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[12] *Melnick v. Consolidation Coal Co. & Director, OWCP*, 16 B.L.R. 1-31 (1991). A CAT scan falls into the "other means" category of 20 C.F.R. § 718.304(c) rather than being considered an x-ray under § 718.304(a). A CAT Scan is "computed tomography scan or computer aided tomography scan. Computed tomography involves the recording of 'slices' of the body with an x-ray scanner (CT scanner). These records are then integrated by computer to give a cross-sectional image. The technique produces an image of structures at a particular depth within the body, bringing them into sharp focus while deliberately blurring structures at other depths. *See,* THE BANTAM MEDICAL DICTIONARY, 96, 437 (Rev. Ed. 1990)."

A determination of the existence of pneumoconiosis can be made if a physician, exercising sound medical judgment, based upon certain clinical data, medical and work histories and supported by a reasoned medical opinion, finds the miner suffers or suffered from pneumoconiosis, as defined in § 718.201, notwithstanding a negative x-ray. 20 C.F.R. § 718.202(a).

Medical reports which are based upon and supported by patient histories, a review of symptoms, and a physical examination constitute adequately documented medical opinions as contemplated by the Regulations. *Justice v. Director, OWCP*, 6 B.L.R. 1-1127 (1984). However, where the physician's report, although documented, fails to explain how the documentation supports its conclusions, an Administrative Law Judge may find the report is not a reasoned medical opinion. *Smith v. Eastern Coal Co.*, 6 B.L.R. 1-1130 (1984). A medical opinion shall not be considered sufficiently reasoned if the underlying objective medical data contradicts it.[13] *White v. Director, OWCP*, 6 B.L.R. 1-368 (1983). Physician's qualifications are relevant in assessing the respective probative value to which their opinions are entitled. *Burns v. Director, OWCP*, 7 B.L.R. 1-597 (1984).

Dr. Forehand examined claimant in connection with his original claim. Dr. Forehand found no evidence of CWP and found no respiratory impairment.

On April 10, 1998, Dr. Ranavaya diagnosed CWP based on a positive x-ray interpretation and claimant's thirty-four years of coal mine employment. In his report dated July 27, 1998, Dr. Ranavaya opined claimant had CWP based on an x-ray and pulmonary function study dated April 10, 1998. I do not afford Dr. Ranavaya's opinion much weight. Dr. Ranavaya based his opinion on the only positive interpretation of the April 10, 1998 x-ray. As discussed above, I found the April 10, 1998 x-ray to be negative for pneumoconiosis based on nine negative interpretations by dually qualified physicians. Furthermore, Dr. Ranavaya based his diagnosis on the April 10, 1998 pulmonary function study which produced non-qualifying results.

Dr. Clary, Board-certified in osteopathic medicine, stated the claimant had intermittent lung problems and shortness of breath and had x-rays in the past which showed parenchymal abnormalities consistent with pneumoconiosis. Dr. Clary opined claimant may need medications in the future for his lungs. I do not afford Dr. Clary's opinion much weight because Dr. Clary's opinions are not well reasoned and he is not well qualified. Dr. Clary does not explain the basis for his diagnosis and his opinions are equivocal.

Finally, Dr. Robinette, Board-certified in internal medicine with a subspecialty in pulmonary diseases, found in his report dated August 17, 1999, that claimant had "probable coal workers' pneumoconiosis." In his report dated February 2, 2000, Dr. Robinette found claimant

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[13] *Fields v. Director, OWCP*, 10 B.L.R. 1-19, 1-22 (1987). "A 'documented' (medical) report sets forth the clinical findings, observations, facts, etc., on which the doctor has based his diagnosis. A report is 'reasoned' if the documentation supports the doctor's assessment of the miner's health. *Fuller v. Gibraltor Coal Corp.*, 6 B.L.R. 1-1291 (1984). . ."

had radiographic evidence of simple CWP confirmed by interstitial markings on a CT. I do not afford Dr. Robinette's opinions much weight. I find his diagnosis in the August 17, 1999 report of "probable" CWP equivocal. I also do not afford his opinion much weight because he bases his diagnosis on a CT in which I found Dr. Coburn's opinion equivocal. Furthermore, Dr. Robinette based his diagnosis on x-ray evidence which I found did not establish the existence of pneumoconiosis.

I find the claimant has not met his burden of proof in establishing the existence of pneumoconiosis. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed.2d 221 (1994).

C. Cause of pneumoconiosis

Once the miner is found to have pneumoconiosis, he must show that it arose, at least in part, out of coal mine employment. 20 C.F.R. § 718.203(a). If a miner who is suffering from pneumoconiosis was employed for ten years or more in the coal mines, there is a rebuttable presumption that the pneumoconiosis arose out of such employment. 20 C.F.R. § 718.203(b). If a miner who is suffering or suffered from pneumoconiosis was employed less than ten years in the nation's coal mines, it shall be determined that such pneumoconiosis arose out of coal mine employment only if competent evidence establishes such a relationship. 20 C.F.R. § 718.203(c).

Since the miner had ten years or more of coal mine employment, the claimant would ordinarily receive the benefit of the rebuttable presumption that his pneumoconiosis arose out of coal mine employment. However, in view of my finding that the existence of CWP has not been proven this issue is moot.

D. Existence of total disability due to pneumoconiosis

The claimant must show his total pulmonary disability is caused by pneumoconiosis. 20 C.F.R. § 718.204(b). Sections 718.204(c)(1) through (c)(5) set forth criteria to establish total disability: (1) pulmonary function studies with qualifying values; (2) blood gas studies with qualifying values; (3) evidence the miner has pneumoconiosis and suffers from cor pulmonale with right-sided congestive heart failure; (4) reasoned medical opinions concluding the miner's respiratory or pulmonary condition prevents him from engaging in his usual coal mine employment; and (5) lay testimony.[14] Under this subsection, the Administrative Law Judge must consider all the evidence of record and determine whether the record contains "contrary probative evidence." If it does, the Administrative Law Judge must assign this evidence appropriate weight and determine "whether it outweighs the evidence supportive of a finding of total respiratory disability." *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-21 (1987); *see also Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195, 1-198 (1986), *aff'd on reconsideration en banc*, 9 B.L.R. 1-236 (1987).

[14] 20 C.F.R. § 718.204(c). In a living miner's claim, lay testimony "is not sufficient, in and of itself, to establish disability." *Tedesco v. Director, OWCP*, 18 B.L.R. 1-103 (1994).

Section 718.204(c)(3) is not applicable because there is no evidence that the claimant suffers from cor pulmonale with right-sided congestive heart failure. § 718.204(c)(5) is not applicable because it only applies to a survivor's claim in the absence of medical evidence.

Section 718.204(c)(1) provides that a pulmonary function test may establish total disability if its values are equal to or less than those listed in Appendix B of Part 718. There were five pulmonary function studies performed between December 28, 1995 and January 11, 2000. None of the studies produced qualifying results. Therefore, I find claimant has not established disability pursuant to section 718.204(c)(1).

Claimants may also demonstrate total disability due to pneumoconiosis based on the results of arterial blood gas studies that evidence an impairment in the transfer of oxygen and carbon dioxide between the lung alveoli and the blood stream. § 718.204(c)(2). More weight may be accorded to the results of a recent blood gas study over one which was conducted earlier. *Schretroma v. Director, OWCP*, 18 B.L.R. 1-17 (1993). Five arterial blood gas studies were submitted between December 8, 1995 and January 11, 2000. The April 10, 1998 study produced qualifying results.[15] Two studies, by a Board-certified pulmonologist, performed subsequently, on July 20, 1999 and January 11, 2000, did not produce qualifying results. Therefore, I find claimant has not established total disability by arterial blood gas studies.

Finally, total disability may be demonstrated, under § 718.204(c)(1), if a physician, exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in employment, i.e., performing his usual coal mine work or comparable and gainful work. § 718.204(b). Under this subsection, " . . . all the evidence relevant to the question of total disability due to pneumoconiosis is to be weighed, with the claimant bearing the burden of establishing, by a preponderance of the evidence, the existence of this element." *Mazgaj v. Valley Camp Coal Company*, 9 B.L.R. 1-201 (1986) at 1-204. The fact finder must compare the exertional requirements of the claimant's usual coal mine employment with a physician's assessment of the claimant's respiratory impairment. *Schetroma v. Director, OWCP*, 18 B.L.R. 1-19 (1993). Once it is demonstrated that the miner is unable to perform his usual coal mine work a *prima facie* finding of total disability is made and the burden of going forward with evidence to prove the claimant is able to perform gainful and comparable work falls upon the party opposing entitlement, as defined pursuant to 20 C.F.R. § 718.204(b)(2). *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988).

The Fourth Circuit rule is that "nonrespiratory and nonpulmonary impairments have no bearing on establishing total disability due to pneumoconiosis." *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241 (4th Cir. 1994). In *Milburn Colliery Co. v. Director, OWCP,[Hicks]*, 21 B.L.R. 2-323, 138 F.3d 524, Case No. 96-2438 (4th Cir. Mar. 6, 1998) *citing Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 243 (4th Cir. 1994), the Court "rejected the argument that '[a] miner need only establish that he has a total disability, which may be due to pneumoconiosis

[15] The study was administered by Dr. Ranavaya, whose credential are not of record.

in combination with nonrespiratory and nonpulmonary impairments.'" Even if it is determined that claimant suffers from a totally disabling respiratory condition, he "will not be eligible for benefits if he would have been totally disabled to the same degree because of his other health problems." *Id*. at 534.

Dr. Forehand found the claimant had no respiratory impairment. Dr. Ranavaya found the claimant suffered moderate impairment with moderate hypoxemia. However, Dr. Ranavaya did not render an opinion on whether claimant was totally disabled from his last coal mine employment. Dr. Robinette opined the claimant had radiographic evidence of CWP and said the condition was chronic. However, Dr. Robinette did not render an opinion on whether the claimant was totally disabled. Dr. Clary stated claimant experienced shortness of breath and "may" need medication in the future for lung problems. I do not afford Dr. Clary's opinion much weight because he did not render an opinion on disability and his opinion is equivocal.

Claimant submitted a report from a vocational consultant, Ms. Jenkins. Ms. Jenkins found claimant's last coal mine job required medium to heavy exertional levels. Ms. Jenkins found claimant unable to return to his past work due to his work related accident and occupational disease. I do not afford Ms. Jenkins' opinion much weight. She is not qualified as a physician to diagnose occupational disease. Furthermore, "nonrespiratory and nonpulmonary impairments have no bearing on establishing total disability due to pneumoconiosis." *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241 (4th Cir. 1994). Ms. Jenkins did not distinguish between CWP and claimant's work accident in finding total disability.

Therefore, I find the claimant has not met his burden of proof in establishing the existence of total disability. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed.2d 221 (1994).

E. Cause of total disability[16]

The Fourth Circuit Court of Appeals requires that pneumoconiosis be a "contributing cause" of the claimant's total disability.[17] *Toler v. Eastern Associated Coal Co.*, 43 F. 3d 109, 112 (4th Cir. 1995); *Jewel Smokeless Coal Corp. v. Street*, 42 F.3d 241, 243 (4th Cir. 1994). In *Street*, the Court emphasized the steps by which the cause of total disability may be determined by directing "the Administrative Law Judge [to] determine whether [the claimant] suffers from a respiratory or pulmonary impairment that is totally disabling and whether [the claimant's] pneumoconiosis contributes to this disability." *Street*, 42 F.3d 241 at 245.

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[16] *Billings v. Harlan #4 Coal Co.*, ___ B.L.R. ___ , BRB No. 94-3721 (June 19, 1997). The Board has held that the issues of total disability and causation are independent; therefore, administrative law judges need not reject a Doctor's opinion on causation simply because the doctor did not consider the claimant's respiratory impairment to be totally disabling.

[17] *Hobbs v. Clinchfield Coal Co.* 917 F.2d 790, 792 (4th Cir. 1990). Under *Robinson v. Pickands Mather & Co./Leslie Coal Co. & Director, OWCP*, 14 B.L.R. 2-68 at 2-76, *914 F.2d 35* (4th Cir. 1990), the terms "due to," in the statute and regulations, means a "contributing cause.," not "exclusively due to." In *Roberts v. West Virginia C.W.P. Fund & Director, OWCP*, 74 F.3d 1233 (1996 WL 13850)(4th Cir. 1996)(Unpublished), the Court stated, "So long as pneumoconiosis is a 'contributing' cause, it need not be a 'significant' or substantial' cause." Id.

There is evidence of record that claimant's respiratory disability is due, in part, to his undisputed history of cigarette smoking. However, to qualify for Black Lung benefits, the claimant need not prove that pneumoconiosis is the "sole" or "direct" cause of his respiratory disability, but rather that it has contributed to his disability. *Robinson v. Pickands Mather & Co./Leslie Coal Co. & Director, OWCP*, 914 F.2d 35, 14 B.L.R. 2-68 (4th Cir. 1990) at 2-76. *Jones v. Badger Coal Co.*, 21 B.L.R. 1-102, BRB No. 97-1393 BLA (Nov. 30, 1998)(*en banc*). There is no requirement that doctors "specifically apportion the effects of the miner's smoking and his dust exposure in coal mine employment upon the miner's condition." *Jones v. Badger Coal Co.*, 21 B.L.R. 1-102, BRB No. 97-1393 BLA (Nov. 30, 1998)(*en banc*) *citing generally, Gorzalka v. Big Horn Coal Co.*, 16 B.L.R. 1-48 (1990).

If the claimant would have been disabled to the same degree and by the same time in his life had he never been a miner, then benefits cannot be awarded. *Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 792 (4th Cir. 1990); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 38 (4th Cir. 1990).[18]

In light of my findings that the claimant has neither established pneumoconiosis, nor that he is totally disabled from performing his last coal mine employment, the issue of causation of total disability is moot.

ATTORNEY FEES

The award of attorney's fees, under the Act, is permitted only in cases in which the claimant is found to be entitled to the receipt of benefits. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to the claimant for the representation services rendered to him in pursuit of the claim.

CONCLUSIONS

In conclusion, the claimant has not established that a material change in conditions has taken place since the previous denial, because he is now disabled due to pneumoconiosis. The claimant does not have pneumoconiosis, as defined by the Act and Regulations. The pneumoconiosis did not arise out of his coal mine employment. The claimant is not totally disabled. He is therefore not entitled to benefits.

ORDER

It is ordered that the claim of RUFFICE C. ESTEP for benefits under the Black Lung

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[18] "By adopting the 'necessary condition' analysis of the Seventh Circuit in *Robinson*, we addressed those claims . . . in which pneumoconiosis has played only a de minimis part. *Robinson*, 914 F.2d at 38, n. 5." *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 1195 n. 8 (4th Cir. 1995).

Benefits Act is hereby DENIED.

RICHARD A. MORGAN
Administrative Law Judge

RAM:EAS:dmr

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits review Board within 30 days from the date of this Order by filing a Notice of Appeal with the **Benefits Review Board, ATTN: Clerk of the Board, P.O. Box 37601, Washington, D.C. 20013-7601**. A copy of a Notice of Appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits, at the Frances Perkins Building, Room N-2117, 200 Constitution Avenue, N.W., Washington, D.C. 20210.